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No. 91-1029

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

MARLENE ANDERSON et al.,

*Petitioners,*

vs.

CONSOL PENNSYLVANIA COAL COMPANY et al.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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January 2, 1992

## QUESTION PRESENTED

The question presented is whether a frivolous class action complaint, later amended to delete all class action allegations, accompanied by seven complaints filed as independent actions and consolidated by the same attorneys, with respect to which those attorneys omitted to move for class certification for five years rather than within the 90 days prescribed by a valid district court rule, may have any tolling effect on the statute of limitations applicable to petitioners' claims?

## Parties to the Proceeding

The petitioners are set forth in the caption of the petition.

The respondents joining in this brief are: Consol Pennsylvania Coal Company; Consolidation Coal Company; Consol Land Development Company; The Monongahela Railway Company; Rheinbraun U.S. Corporation; Rheinbraun A.G.; and Maria Theresia Bergbaugesellschaft mbH.

Other respondents in the proceedings below were David Boggs; Ewing Pollock; Pollock, Pollock and Thomas; The Upshur Agency, Inc.; Karl Nixon; Mike Wilson; and William Reese.*

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* Pursuant to Rule 29.1, we advise the Court that the corporate respondents are owned as follows:

Rheinbraun U.S. Corporation is a subsidiary of Consol Energy, Inc. The latter is a subsidiary of Du Pont Energy Company, Rheinbraun A.G., and Rheinbraun U.S. GmbH. Du Pont Energy Company is a subsidiary of E.I. Du Pont De Nemours and Company.

Rheinbraun A.G. and Rheinbraun U.S. GmbH are subsidiaries of RWE AG.

Consolidation Coal Company is a subsidiary of Consol Energy Inc. Consol Land Development Company was merged into Consolidation Coal Company in 1987.

Consol Pennsylvania Coal Company is a subsidiary of Consolidation Coal Company.

Maria Theresia Bergbaugesellschaft is a subsidiary of Rheinbraun AG.

The Monongahela Railway Company is a subsidiary of Consolidated Rail Corporation.

The Upshur Agency, Inc., does not have a parent corporation.

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## RESPONDENTS' BRIEF IN OPPOSITION

### STATEMENT OF THE CASE

#### Introduction

These actions under the RICO statute, 18 U.S.C. §§1961-1968 (1988 & Supp. 1989), were filed on September 17, 1987, more than four years after petitioners knew, or should have known, of their claims; the claims were consequently time-barred. To escape the axe of the statute of limitations, petitioners invoke the *American Pipe* doctrine. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 552-53 (1974). That doctrine, as modified

in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), holds that when a non-frivolous class suit is filed, but class action status is denied because the number of putative class members is too small, the filing of the original class suit tolls the running of any statute of limitations for such members until the court has found the suit inappropriate for class action status. Petitioners contend that a 1983 action filed in the Pittsburgh federal district, the so-called *Loughman* case, was such a class action, under which petitioners may take cover.

The District Court rejected the argument. Cautioned by Justice Powell that the *American Pipe* doctrine invites abuse, *see Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring), the District Court pointed out that Ms. Loughman had been erratic about maintaining her suit as a class action, and held that she disregarded important procedures established by a local court rule that required her to move in a timely manner to certify the class in order to give notice to her defendants (these respondents) that her suit was a class action. In short, the *Loughman* case was a frivolous class action, respondents reasonably relied on Loughman's failure to move for certification, and *American Pipe* was unavailable to petitioners to lift the bar of the statute.

The petition must therefore be denied because the case was rightly decided below. Moreover, the case is unimportant to the administration of federal justice because disposition of the petition turns on unique facts, peculiar to the procedural errors committed by Ms. Loughman.

## The Facts

The petition omits and distorts inconvenient facts. In accordance with Sup. Ct. R. 15.1, the facts must be restated.

On June 22, 1987, this Court held that a four-year statute of limitations applied to actions founded on alleged violations of the RICO statute, 18 U.S.C. §§1961-1968 (1988 & Supp. 1989); *Agency Holding Corp. v. Malley-Duff & Assoc. Inc.*, 483 U.S. 143 (1987). Three months later, on September 17, 1987, these eight actions (the "*Anderson Cases*") were filed, severally, in the

United States District Court at Pittsburgh. Federal question jurisdiction, 28 U.S.C. §1331 (1988), was founded on alleged violations of the RICO statute predicated on frauds said to have been perpetrated by respondents to induce petitioners to sell a string of parcels of land for the construction of a coal railroad spur.

District Judge D. Brooks Smith held that the claims of petitioners accrued before September 17, 1983, i.e., more than four years before the filing of their complaints (A 16-26) and that the complaints were consequently untimely; he granted the respondents' motion for summary judgment. (A 40).[1]

Petitioners contended in the District Court that the complaints were filed in good time because the four-year statutory period had been tolled under *American Pipe* by the filing in 1983 of an action by another landowner along the railroad right-of-way, Dorothy Loughman. Petitioners claimed that the *Loughman* action was filed against the present respondents on behalf of a class of which petitioners were members.

Judge Smith rejected the tolling argument. The District Court found that after the original Loughman complaint was filed in April, 1983 (containing the barest class action allegations), seven companion cases to the *Loughman* case were filed separately against the same defendants in July, 1983, without class allegations and without any pretense of joinder or intervention in the *Loughman* case, by the same law firm that represented Ms. Loughman (and which represents these petitioners).[2] The severally filed cases were consolidated pursuant to court order of

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[1] References in the form "(A __)" are to pages of the appendix to the petition, and in the form "(Pet. __)" are to pages of the petition.

[2] As the cases were filed separately the District Court assigned separate docket numbers to each: Civil Action Nos. 83-1674, 1675, 1676, 1677, 1678, 1679, and 1754. The background of the *Loughman* case and its companions is described in *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 607-609 (3d Cir. 1991).

August 25, 1983, a procedure inconsistent with class action status,[3] and, in April, 1985, the half-hearted class allegations of the original *Loughman* complaint were abandoned by a third amendment filed by that law firm. The judge's review of the record (A 27-28) confirms the above:

> [T]he original complaint in the Loughman cases, filed on behalf of Ms. Loughman only on April 19, 1983, contained class action allegations. Thereafter, in July, 1983, Loughman's counsel (who also is counsel for plaintiffs in this matter) filed complaints on behalf of the remaining seven Loughman plaintiffs, which complaints *lacked any class allegations*. At about the same time, an amended complaint repeating the class action allegations were filed on behalf of Ms. Loughman.
>
> The eight Loughman cases were *consolidated* in August, 1983 and, more than a year and a half later, in April, 1985, plaintiffs' counsel filed a Third Amended Complaint on behalf of each plaintiff. *None of the April, amended complaints contained class action allegations*. This Court denied plaintiffs' Motion for Class Certification in December, 1988, citing plaintiffs' failure to comply with Local Rule 34. (emphasis supplied).

The judge found that the petitioners, all "neighboring landowners" of Ms. Loughman, knew about, or should have known about, their claims (and the highly publicized claims of their neighbors) in the period October 1982 to April 1983 (A 16-17). It was a favorable verdict in *Loughman* in early 1987 (A 4) that prompted the filing of the *Anderson Cases* in September, 1987.[4]

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[3] "[T]he most frequently used *alternative* to a class suit for handling multiparty claims is a consolidated action brought by the individual parties . . ." 3B James W. Moore & John E. Kennedy, *Moore's Federal Practice* ¶23.45 [3], at 23-327 (2d ed. 1990) (emphasis supplied).

[4] In respect of Loughman's RICO claims the verdict was set aside by judgment n.o.v.; that judgment was affirmed. *See Hughes*, 945 F.2d at 609-11.

Indicating that the *Loughman* complaint could not be fairly regarded as a class action under *American Pipe*, Judge Smith emphasized that Loughman had not complied with local District Court Rule 34(c), which requires a would-be class action plaintiff to move for a determination that the case may be maintained as a class action within 90 days after the filing of the complaint (unless the period is extended by the district court for good cause). (A 30, n.12). Ms. Loughman, without excuse, had not moved for such a determination until late 1988, i.e., *five years* after the filing of her complaint and well after trial and verdict in her case and its consolidated companions; her motion was denied on December 7, 1988. (A 28).

On their appeal to the Third Circuit, petitioners pursued their *American Pipe* contention. The Court of Appeals affirmed summary judgment for the defendants, without opinion (A 45).

## REASONS FOR DENYING THE WRIT

### Summary of Argument

The petition should be denied. The Anderson Cases were decided correctly. Petitioners were well informed about their neighbors' claims in 1982-83 but chose to await a favorable jury verdict in *Loughman* before filing in 1987. *Loughman* and its companions, to which petitioners would tack their claims, were neither conceived nor maintained as genuine class actions, and Ms. Loughman failed utterly to comply with a reasonable local rule designed to give respondents notice of Loughman's intention to file a class action.

The issues presented by petitioners are of no importance to the development of the *American Pipe* doctrine because the viability of the petition turns on the unique procedural carelessness of Ms. Loughman and her companions.

## I.

### THE COURTS BELOW RIGHTLY DECIDED THESE ANDERSON CASES BECAUSE THE LOUGHMAN CASE AND ITS COMPANIONS WERE NOT MAINTAINED AS CLASS ACTIONS AND DID NOT COMPLY WITH LOCAL RULE 34(c).

It is clear from Judge Smith's review of the record (A 27-28) that the *Loughman* case and its seven companions, filed in early 1983, were neither conceived nor maintained as true class actions: the seven companion cases were filed as independent actions, without class allegations and without any pretense about joining Loughman's complaint, and the cases were consolidated in August, 1983, as separate actions. Loughman's complaint was itself amended in 1985 to abandon its class allegations by the law firm that represented Loughman and her companions and which represents the present petitioners.[5]

Even more egregious was Loughman's indifference to local Rule 34(c) of the United States District Court for the Western District of Pennsylvania. (The text of the Rule is set out by Judge Smith at A 30, n. 12.) That Rule is designed to ensure, in accordance with the rationale of *American Pipe*, 414 U.S. at 555, that a defendant will learn reasonably promptly that he faces a serious class action. Hence, within 90 days of the filing of her original class complaint (unless the period were extended for good cause), Loughman was under a duty to move for a determination that her action could indeed be maintained as such. She omitted to do so for five years.

Local Rule 34(c) is not applied with draconian severity, for it permits the plaintiff to show good cause for extending the 90-day period; and, even if the plaintiff neglects that course, the court will be forgiving if the plaintiff can show that the motion was made "as soon as practicable." *Slanina v. William Penn*

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[5] An amended complaint supersedes the prior complaint and waives prior claims not asserted in the amendment. *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

*Publishing Corp*,, 106 F.R.D. 419 (W.D.Pa. 1984) (Mansmann, D.J.) (where fears of reprisal are shown to prevent compliance with local Rule 34, and motion is made "as soon as practicable," latter test applied); *cf.* Fed. R. Civ. P. 23(c)(1) (court must determine whether class action can be so maintained "as soon as practicable").

Local Rule 34(c) is thus reasonable in conception, discretionary in implementation, and orders thereunder are reviewable only for an abuse of discretion. *See Walton v. Eaton Corp.*, 563 F.2d 66, 71 (3d Cir. 1977) (no abuse of discretion for U.S.D.C.E.D. Pa. to deny motion under counterpart local rule made 21 months after filing). The validity of such a rule cannot be seriously questioned, for it gives effect to the "as soon as practicable" test of Fed. R. Civ. P. 23(c)(1) and is thus authorized by 28 U.S.C. §2071 and Fed. R. Civ. P. 83. *Walton, supra* (approving counterpart local rule in Eastern District of Pennsylvania); *Green v. Philbrook*, 576 F.2d 440, 446 (2d Cir. 1978) (approving strict application of counterpart local Rule in District of Vermont).

Yet, Loughman failed to move for certification until 1988, *five years* after the filing of her original complaint and well after verdict in her case; the motion was rightly denied on December 7, 1988. Judge Smith consequently held that "[d]efendants reasonably relied upon the *Loughman* plaintiffs' failure to move for certification" and that it would be an abuse of *American Pipe* to grant the protection of that decision to petitioners, citing *Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring). (A 30-31).

Federal courts permit the equitable tolling of statutes of limitations "only sparingly". *Irwin v. Veterans Admin.*, 111 S.Ct. 453, 457 (1990) (Rehnquist, Ch.J.). Such relief is not extended when (among other causes) "the claimant failed to exercise due diligence in preserving his legal rights". *Id.* at 458. Although petitioners here seek the equitable tolling of the statute of limitations, their informed indolence during the period that the statute was running bars consideration of their present appeal to equity.

## II.

## THE PETITION SHOULD BE DENIED BECAUSE THE ISSUES IT RAISES ARE PECULIAR TO PROCEDURAL ERRORS COMMITTED BY LOUGHMAN.

The question presented by the petition is not, as petitioners would have it, whether the simple failure of Loughman to comply with local Rule 34(c) ended the tolling of the statute of limitations for petitioners (Pet. i). Rather, as the District Court's review of the record indicates, the question presented is whether (a) the frivolous class action complaint filed in *Loughman*, (b) later amended to delete all class action allegations, (c) accompanied by seven companion complaints filed as independent actions by Loughman's attorneys and then consolidated, (d) with respect to which those attorneys moved for class certification five years (not 90 days) after filing, could have any tolling effect on the applicable statute of limitations for the benefit of these informed, yet indifferent, petitioners.

When the issue is stated correctly, it is plain that, at bottom, the petition involves no more than Ms. Loughman's peculiar disregard for procedural rules. This Court's intervention would not, therefore, enlarge instructively the jurisprudence of the *American Pipe* doctrine. The decision of the District Court was rightly affirmed summarily by the Third Circuit.

## CONCLUSION

The petition should be denied. The decision below was correct in holding that *Loughman* was an invalid class action under which these *Anderson Cases* cannot be subsumed so as to toll the statute of limitations. The petition fails to present issues of the slightest general importance.

Respectfully submitted,

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